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IN THE

Supreme Court of the United States

October Term, 1973

No. 73-235

MARCO DEFUNIS and BETTY DEFUNIS, his wife;
MARCO DEFUNIS, JR. and LUCIA DEFUNIS, his wife,
Plaintiffs-Petitioners,

v.

CHARLES ODEGAARD, President of the University of Washington; RICHARD L. RODDIS, Dean of the University of Washington Law School; RICHARD KUMMERT, ROBERT T. HUNT and RICHARD L. RODDIS, Admissions Committee of the University of Washington Law School; HAROLD S. SHEFELMAN, JAMES R. ELLIS, R. MORT FRAYN, ROBERT L. FLENNAUGH, JACK G. NEWPERT, ROBERT F. PHILIP and GEORGE B. POWELL, Regents of the University of Washington; HAROLD GARDINER, Registrar of the University of Washington; and UNIVERSITY OF WASHINGTON,
Defendants-Respondents.

UPON CERTIORARI FROM THE JUDGMENT OF THE SUPREME COURT OF WASHINGTON

BRIEF OF AMICUS CURIAE
THE CITY OF SEATTLE

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UPON CERTIORARI FROM THE JUDGMENT OF THE SUPREME COURT OF WASHINGTON

BRIEF OF AMICUS CURIAE THE CITY OF SEATTLE

INTEREST OF AMICUS CURIAE

This brief of Amicus Curiae is submitted in support of the decision of the Supreme Court of the State of Washington in *DeFunis v. Odegaard*, 82 Wn.2d 11, 507 P.2d 1169 (1973) and the salutory legal principle that a state

"law school may, in consonance with the equal protection provisions of the state and federal constitutions, consider the racial or ethnic background of applicants as one factor in the selection of students." 82 Wn.2d at 13, 36, 42; 507 P.2d at 1171, 1181, 1187. Both the *DeFunis* decision and the rule of law announced have already had a favorable impact upon The City of Seattle and its residents for the reasons, among others, outlined in the next three paragraphs.

The decision lets the University of Washington law school continue its affirmative action program, which has enabled the City's law department, other governmental agencies, and private law firms to secure the talents of minority persons that would not have been available otherwise. In the long run, continuation of this program will assure that the City's municipal court judges, its municipal attorneys, and public officials with legal backgrounds will reflect the city's multi-racial population. Since its founding over five decades ago, graduates of the University law school have filled many important state and local government offices; and the high quality of the legal training provided gives promise that this tradition will continue.

The decision allows the University to carry on its affirmative action program in other professional schools with limited student capacity, such as medicine and dentistry, and for undergraduate studies; and it sets a precedent for other colleges and universities to do so. By educating a broad cross-section of students, the University provides a representative pool of professional talent from which the City, other governments, and private employers may draw to create and to maintain a multi-racial work force. This

is especially important in law enforcement, *Erie Human Relations Comm. v. Tullio*, 6 FEP Cases 733 (W.D. Pa. 1973) and in the higher level positions where a college education proves very useful in day-to-day performance and for promotion. The House Committee Report recommending passage of the Equal Employment Opportunity Act of 1972 stated:

> "The problem of employment discrimination is particularly acute and has the most deleterious effect in these governmental activities which are most visible to the minority communities (*notably education, law enforcement, and the administration of justice*) with the result that the credibility of the government's claim to represent all the people equally is negated." (emphasis supplied) 2 *Congressional & Administrative News* 1972, 2137 at 2153;
>
> ". . . Americans rely upon the maxim 'government of the people', and traditionally measure the quality of their democracy by the opportunity they have to participate in governmental processes. It is therefore imperative that equal opportunity be the touchstone of the Federal system." Id at 2157

The City's experience with its own affirmative action program has shown that racial integration makes city government more responsive to citizen needs and viewpoints and sustains a broadly-based public confidence.

The *DeFunis* decision serves as an important precedent for sustaining the City's on-going activities to afford disadvantaged minorities effective equality of opportunity in municipal employment, against charges of "inverse discrimination," *e.g. Brabant v. City*, King County Superior Court Cause No. 757364. Under an Executive Order of the Mayor, dated October 16, 1972, adopted by the City Council by Resolution 23849 and implemented by Ordi-

nance 101548, all city departments are required to establish and maintain an effective affirmative action program with goals and timetables for employment of minorities at all job levels until the effects of inequality of opportunity are eliminated. Under Civil Service Commission Rule 7.03(j), the Secretary of the Commission may certify a qualified minority person for appointment without regard to the order of eligibles ranked by examination scores when necessary to implement a city department's Affirmative Action Program.

• • •

To reduce overlapping with other memoranda, this brief is restricted to the cases and authorities involving consideration of race in affirmative action programs and in evaluating test scores in employment settings. These cases are persuasive here because:

a) In both employment and education anti-discrimination cases, the law implements the Fourteenth Amendment to the United States Constitution, gives effect to the same fundamental principles and statutory purposes, and seeks effective equality of opportunity for all citizens. This touchstone supplies a standard to measure the governmental action under review;

b) Affirmative action programs in education and employment are often analogous. For example, apprenticeship and on-the-job training programs serve as a medium of teaching skilled trades that is sometimes as important to those participating and to the crafts or industry as a college or university education is in developing the abilities needed in professions and learned positions; and

c) The employment cases and those in education often

reflect comparable patterns (e.g., the use of tests and assignments based thereon) and analysis. Disparate racial consequences are not discriminatory in hiring or employment when compelled by an overriding business necessity, *Griggs v. Duke Power Co.*, 401 U.S. 424 (1971); pupil assignments or curriculum differences disproportionately affecting disadvantaged minorities may only be made when necessary to fulfill an educational purpose, *Larry P. v. Riles*, 343 F. Supp. 1306 (D.C. N.D. Cal. 1972).

Affirmative action in education and employment are complementary to each other, and both are necessary to make the triad, "government of the people, by the people and for the people," expressed by President Abraham Lincoln over a century ago into a profound reality for all Americans.

SUMMARY OF ARGUMENT

Affirmative Action programs, such as that of the University of Washington, are appropriate:

I. To comply with the Civil Rights Act of 1964, as supplemented by the Equal Employment Opportunity Act of 1972, and Executive Orders of the President implementing them (pages 6-11 *infra*);

II. To overcome disadvantages that adhere in competitive examinations due to social, economic, or educational deficiencies of minorities caused by racial discrimination (pages 7-18 *infra*); and

III. To properly evaluate the abilities of minority aspirants where screening procedures would not otherwise fully portray the candidate's personality (pages 18-19 *infra*).

ARGUMENT

I. Affirmative Action Programs Equalize Opportunity

The Constitution of the United States, civil rights laws, and court decisions authorize adoption of affirmative action programs, such as that of the University of Washington, to overcome practices and usages that have or had a discriminatory effect on account of race, creed, or color and to counteract the consequences of past discrimination on that basis, *cf. Norwalk CORE et al. v. Norwalk Redevelopment Agency et al.*, 395 F.2d 920, 931-932 (2nd Cir. 1968).

The Fourteenth Amendment to the United States Constitution provides in part as follows:

> "Section 1. All persons, born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny any person within its jurisdiction the equal protection of the laws."
>
> • • •
>
> "Section 5. The Congress shall have power to enforce by appropriate legislation, the provisions of this article."

Section 1 outlaws racial discrimination by government, *Shelley v. Kraemer*, 334 U.S. 1 (1948); Section 5 empowers Congress to eliminate manifestations of discrimination by appropriate legislation, *Ex parte Virginia*, 100 U.S. 313, 345 (1880).

On July 2, 1964 the Congress enacted the Civil Rights Act of 1964, P.L. 88-352, 78 Stat. 241, 42 USC § 2000,

et. seq.). Title VI "Nondiscrimination in federally-assisted programs," § 601 and § 602 (42 USC § 2000d) withdraws federal participation from activity with racial discrimination, and directs action to effect its ban;

> "§601. No person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance.
>
> "§602. Each Federal department and agency which is empowered to extend Federal financial assistance to any program or activity, by way of grant, loan or contract other than a contract of insurance or guaranty, is authorized and directed to effectuate the provisions of section 601 with respect to such program or activity by issuing rules, regulations, or orders of general applicability which shall be consistent with achievement of the objectives of the statute authorizing the financial assistance in connection with which the action is taken . . ."

Title VII pertaining to employment through section 703 (42 USC § 2000e-2) effectively forbade all practices "designed, intended or used" to discriminate by race:

> "Sec. 703(a) It shall be an unlawful employment practice for an employer—
>
> (1) to fail or refuse to hire or to discharge any individual or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex or national origin; or
>
> (2) to limit, segregate, or *classify his employees in in any way which would deprive or tend to deprive any individual of employment opportunities* or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex or national origin. (Emphasis supplied)
>
> • • •

"(h) Notwithstanding any other provisions of this title, *it shall not be an unlawful employment practice for an employer . . . to give and to act upon the results of any professionally developed ability test provided that such test*, its administration or action upon the results *is not designed, intended or used to discriminate* because of race, color, religion, sex or national origin." (78 Stat. 255, 42 USC § 2000e-2) (Emphasis supplied)

The succeeding sections created an Equal Employment Opportunity Commission, and gave it responsibility for enforcement (42 USC 2000e *et seq.*) *cf.* 29 CFR 1601; (30 Fed. Reg. 8407, *et seq.* June 30, 1965).

The President of the United States pursuant thereto issued Executive Order 11246 (30 Fed. Reg. 12,319), later superseded by Executive Order 11478, issued August 8, 1969 (34 Fed. Reg. 12,985) requiring that affirmative action programs be established and maintained in all phases of federal and federally-assisted activity to attain equal employment opportunity. Federal agencies must include affirmative action provisions in all grants-in-aid agreements, and state or local governments contracting with them will be bound thereby. In effect, Executive Order 11478 and various agency regulations interpret Section 601 of the Civil Rights Act of 1964 as a mandate to secure participation of all Americans, including minorities, *cf.* EDA Regulation 13 CFR Chapter III §311.60 *et seq.* 36 Fed. Reg. 20360 (1971).[1] The statutory phrase "no person . . . excluded" makes a double negation that is treated as a positive direction.

1. The Congress gave a similar effect to the Civil Rights Act in the Education Amendments of 1972 (P.L. 92-318, 86 Stat. 235) by defining "minority group" (§ 702(a)(3)), prohibiting certain grants to agencies that had "in effect" excluded "minority group childrtn" (§ 706(d)) and requiring participation in planning by their parents (§ 710(a)).

Where discriminatory practices or racial imbalance in an industry caused by past discrimination would permeate federally-supported activities, the courts have sustained vigorous affirmative action by the United States to assure equality of opportunity, including the setting of "specific goals of minority manpower utilization." To reach the goals, the contractor has had to recruit and to hire minority workmen at a prescribed ratio for each nonminority that would compensate for the effect of past exclusion, e.g., the "Philadelphia Plan" sustained in *Contractors Association of Eastern Pa. v. Secretary of Labor Shultz*, 311 F. Supp. 1002 (E.D. Pa. 1970) *aff'd* 442 F.2d 159 (3rd Cir. 1971) *cert. den.* 404 U.S. 854 (1971); the "Ogilvie Plan" for Madison & St. Clair Counties, Illinois, *Southern Illinois Builders Association v. Ogilvie*, 327 F. Supp. 1154 (S.D. Ill. 1971) *aff'd* 471 F.2d 680 (7th Cir. 1972); the "Boston Plan," *Associated General Contractors v. Altshuler*, 5 FEP Cases 1105 (D. Mass. 1973); *cf, Weiner v. Cuyahoga Community College*, 238 N.E.2d 839, 844 (1968) *aff'd* 249 N.E.2d 907 *cert. denied* 396 U.S. 1004 (1970); *Trustee of Tufts College v. Volpe Const. Co.*, 358 Mass. 331, 264 N.E.2d 676 (1970); *Northeast Construction Co. v. Romney*, 5 EPD 8495 (C.A. D.C. 1973).

Such affirmative action programs received Congressional approval by the Equal Employment Opportunity Act of 1972 (Public Law 92-261; 86 Stat. 103). In the House Committee Report, the Congress documented the underrepresentation of minorities in supervisory or skilled occupations (such as the census classifications of professional-technician, managers, clerical, sales and craftsmen), in state and local governmental positions, and in higher level and policy-making positions of the federal government,

expressed its impatience at the rate of progress, and fashioned a legislative remedy, 2 U.S. Congressional & Administrative News 1972, 2137 at 2140, 2153, and 2158. The Act, among other provisions, in Section 2 redefined; "person" and "employer" to include state and local government; in Section 13 made reference to and thereby granted recognition of affirmative action plans in employment; and in Sections 4 through 7 extended the powers and jurisdiction of the Equal Employment Opportunity Commission.

Inequality of opportunity caused by discrimination or the perpetuation of its legacy warrants corrective employment practices, e.g., *U.S. v. Wood, Wire & Metal Lathers Etc. Union, Local No. 46*, 471 F.2d 408 (2nd Cir. 1973) *cert. den.* 37 L. Ed. 2d 398 (1973); *Commonwealth v. O'Neill*, 348 F. Supp. 1084 *aff'd* 473 F.2d 1029 (3rd Cir. 1973). A marked racial imbalance in an employer's work force creates or corroborates an inference of restrictive or exclusionary practices, *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 805 (1973), *Harper v. Mayor Etc. of Baltimore*, 359 F. Supp. 1187, 1193 (D. Md. 1972), *Erie Human Relations Comm. v. Tullio*, 6 FEP Cases 733 (W.D. Pa. 1973). When statistics establish an imbalance, action may be taken to secure greater integration of the work force although the existence of reasonable cause for finding discrimination may be denied, e.g., *National Organization for Women v. Bank of California*, 6 EPD 8867 (N.D. Cal. 1973) (consent decree). *Cf.* EEOC Regulations 29 CFR § 1607.13; 41 CFR 60 part 60-3 § 60-3.13.

The constitutional foundation underlying affirmative action plans was aptly explained by the District Court in *Contractors Association etc. v. Shultz*, 311 F. Supp. 1002 at 1010 (E.D. Pa. 1970):

". . . It is equally clear that if this plan is properly

> administered it will be a plan of inclusion rather than exclusion. . . . The strength of any society is determined by its ability to open doors and make its economic opportunities available to all who can qualify. It is fundamental that civil rights, without economic rights, are mere shadows. These two rights are not only equal but a must, and when realized will bring into full play that protection to which our Constitution and statutes are dedicated."

This reasoning likewise applies with apprenticeship programs and on-the-job training, *U.S. v. IBEW Local 212*, 472 F.2d 634 (6th Cir. 1973), *U.S. v. Ironworkers (BSOIW), Local 10*, 6 EPD ¶ 8735 (5th Cir. 1973), and to public participation in other activities, including higher education, that provide training for careers or to perform social services.

II. Affirmative Action Programs Neutralize Testing Disparity

The University's Affirmative Action Program in this case, provided a counterweight to offset racial disparities that might have resulted from an across-the-board application of the law school grade prediction formula or other academic criteria, such as grade point averages or law school admission test scores.[2] In its testing for undergraduate admission, the University had found that denial of equivalent educational opportunities and socio-economic deprivations had rendered the "conventional accreditation system"

2. Finding of Fact XXI states 6 minority applicants (excluding Oriental-Americans) had a predicted first year average at 76.23 or above (A 52; Tr. 13). The University's Proposed Finding VIII states "There were in all 70 applicants from minority races. . . ."293 applicants were accepted for admission (Tr. 38). 297 applicants had predicted first year averages of 76.20 or above (A 34; Tr. 44). Therefore, if acceptances for admission were determined by ranking of predicted first year averages, no more than six minorities would have been admitted—a maximum ratio of 1 in 12 of the minority applicants while 1 in 5 of the others would have been accepted.

an inadequate indicator of the full qualifications of certain minorities (St. 233-234). Several years of undergraduate schooling and special preparatory programs probably diminish the disparity. However, intense competition due to the large number of applicants could make a small disparity decisive, *cf. Fowler v. Schwarzwalder*, 348 F. Supp. 844, 846 (D.C. Minn. 1972), 351 F. Supp. 721 (1972) (73% of the Blacks taking a St. Paul Merit Examination passed but none scored high enough for hiring). A program for minority admission to professional schools acts as a precaution to avert or to alleviate any discriminatory effect from the examination and screening process.

In *Minority Access to College*, p. 58 (Schocken Books, N.Y. 1971), a Ford Foundation Report, Dean Fred E. Crossland, former Dean of Admission of New York University, found that most minorities (except Oriental-Americans) generally score lower on conventional written tests than the remainder of the population:

> "Virtually every test that purports to measure educational aptitude or achievement reveals that the mean of the scores of minority youth is about *one standard deviation* below the mean of the scores of the rest of the population. This disturbing observation has been examined and re-examined in test after test, and it appears to be consistent."

The "standard deviation" is a mathematical measure of dispersion of individual units within a normal population and defines the range in which a proportionate number of cases will fall in a normal population.

If the mean of the scores of minorities (except Oriental-Americans) taking an examination falls one standard deviation below the rest of the population, neutral application

of test results would cause a large under-representation of those minorities in the upper groupings. This table illustrates this fact. For simplicity in comparison, it assumes that minorities comprise ten percent of the applicants.[3] Column 1 sets out the top percentile of all applicants that will qualify as candidates for an interview or for the job; Column 2 shows the percentage of all the minority applicants that will reach the top candidate status; Column 3 shows the percentage of all the other applicants that will make the coveted candidate status; Column 4 shows the representation of minorities as a percentage of the top group.

(Col. 1) Top Percentile Selected	(Col. 2) % of minority applicants that make top group	(Col. 3) % of other applicants that make top group	(Col. 4) minority representation in top group as %
10% (top tenth)	1.5%	10.9%	1.50%
25% (top ¼)	6.0	27.1	2.40
33⅓ (top third)	9.5	36.0	2.84
50% (top half)	18.5	53.5	3.70
66⅔ (top two-thirds)	31.5	70.6	4.72
total group (no test or all pass)	100.0%	100.0%	10.00%

As an example, assume these facts: 400 persons take a conventional examination; 40 are minority other than Oriental-American; the applicants are a typical cross-section of the population; and the limited number of positions permits selection of only the top 25%. If 40 were selected, only 1 would ordinarily be a minority person.

A minority mean one-half standard deviation below the

3. The University's Proposed Findings states 1601 completed applications for admission were received, of which, 70 were from minorities (Findings of Fact IV and VIII, Tr. 25 and 29, A 27)—a ratio of 4.37%, rather than 10%. The figures in the Findings, while sparse, tend to show the mean of the scores of the minority applicants within one-half standard deviation below the rest of the population.

rest of the population causes a similar, but less severe, result, as shown in the following table:

(Col. 1) Top Percentile Selected	(Col. 2) % of minority applicants that make top group	(Col. 3) % of other applicants that make top group	(Col. 4) minority representation in top group as %
10% (top tenth)	4.0%	10.7%	3.98%
25% (top ¼)	13.0	26.4	4.57
33⅓ (top third)	19.0	34.9	5.70
50% (top half)	32.0	52.0	6.83
66⅔ (top two-thirds)	50.0	68.6	7.49
total group (no test or all pass)	100.0%	100.0%	10.00%

Insofar as the disparity reflects denial of social, economic and educational opportunities to minorities, mechanical application of the test scores would fall short of measuring personal ability, *cf. Serna v. Portales Municipal Schools*, 351 F. Supp. 1279 (D. N.M. 1973).

In an employment setting, tests that disproportionately exclude disadvantaged minorities may be used only if a "reasonably necessary connection" were shown between the qualities tested and the position or job to be performed. The United States Supreme Court in *Griggs v. Duke Power Co.*, 401 U.S. 424 (1971) found that Duke Power Co., a North Carolina utility, had violated the Civil Rights Act of 1964 by its job qualification standards and testing procedure. Although neutrally applied, the tests unnecessarily screened out Blacks at a disproportionate rate—a consequence "directly traceable to race" because Blacks had long received an inferior education in North Carolina's segregated schools, 401 U.S. at 430. The Supreme Court's opinion regards the test results, taken as a group and broken down along racial lines, as a primary indication of discrimination, and uses the job placement rate as the main

measure of compliance with the Civil Rights Act of 1964 unless the employer can prove a business necessity for using factors that exclude minorities:

> "The Act proscribes not only overt discrimination but also practices that are fair in form, but discriminatory in operation. The touchstone is business necessity. If an employment practice which operates to exclude Negoes cannot be shown to be related to job performance, the practice is prohibited." (401 U.S. at 431)
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> • • •
>
> "The Company's lack of discriminatory intent is suggested by special effort to help the undereducated employees through Company financing of two-thirds the cost of tuition for high school training. But Congress directed the thrust of the Act to the *consequences* of employment practices, not simply the motivation. More than that, Congress has placed on the employer the burden of showing that any given requirement must have a manifest relationship to the employment in question."

The decision cited Equal Employment Opportunity Commission Guidelines on Employee Selection Procedures, 29 CFR § 1607 (35 Fed. Reg. 12333, Aug. 1, 1970), 401 U.S. at 433 as expressing the will of Congress, 401 U.S. at 434.

The EEOC Guidelines forbid regular use of a "test" that "adversely" affects the "opportunities of minority persons or women for hire, transfer, promotion, training, or retention unless validated" according to its regulations, i.e. the racial disparity is inevitable in selecting capable people for the position, 29 CFR XIV § 1607; 41 CFR 60, part 60-3 § 60-3.3. "Test" is defined broadly to embrace all formal systems of rating an applicant's ability, background or experience, ibid. § 1607.2; § 60-3.2. Wherever feasible, examination results are to be broken down by racial groupings,

ibid. § 1607.4(a); § 60-3.4. If a greater ratio of minorities are rejected for reasons unrelated to performance-on-the-job, the test may either be used only with the majority group, or a dual system of scoring must be adopted, ibid. § 1607.5(a)(5); § 60-3.5(a)(5), *cf. Henderson v. First National Bank*, 6 EPD ¶ 8866, p. 5665, 5668 (D.C. Ala. 1973), where the Blacks hired had lower average test scores than whites employed.

A disproportionate failure rate among minorities on employment tests, and/or a racial imbalance among the employees hired, establish a *prima facie* case of violation of the Civil Rights Act with the employer, including government agencies, obliged to produce a valid explanation based on business necessity, 41 CFR 60, part 60-3 § 60-3.13, 3.14; unsatisfactory explanations have led to corrective affirmative action plans that are addressed both to overcoming the testing disparity and to correcting racial imbalance, e.g.

Carter v. Gallagher, 452 F.2d 315 (8th Cir. 1971) (Minneapolis Firemen tests)

Castro v. Beecher, 459 F.2d 725 (1st Cir. 1972) (Police eligibility test)

Western Addition Community Association v. Alioto, 330 F. Supp. 536 (N.D. Cal. 1971), 340 F. Supp. 1351 (N.D. Cal. 1972) and 6 FEP Cases 85 (N.D. Cal. 1973) (San Francisco Firemen tests)

Shield Club v. City of Cleveland, 5 EPD ¶ 8406 (N.D. Ohio 1972) (Cleveland Policemen selection)

Bridgeport Guardians, Inc. v. Bridgeport Civil Service Commission, 5 EPD ¶ 8502, 354 F. Supp. 778 (D. Conn. 1973), 6 EPD ¶ 8755 (2nd Cir. 1973) (eligibility examinations for patrolmen)

Smith v. City of East Cleveland, 6 EPD ¶ 8831 (N.D. Ohio 1973) (Examination for policeman)

The Vulcan Society of New York Fire Department v. Civil Service Commission, 360 F. Supp. 1265 (S.D. N.Y. 1973) (Fire Department eligibility examination)

Arnold v. Ballard, 5 EPD ¶ 8630, 6 EPD ¶ 8675 (N.D. Ohio 1973) (Akron Fire Department tests)

"A procedure may appear on its face to be fair and neutral, but if in its application a discriminatory result ensues, the procedure may be constitutionally impermissible." *Penn v. Stumpf*, 308 F. Supp. 1238, 1244 (N.D. Cal. 1970) (setting aside entrance tests for police officer in Oakland). See also, the House Committee Report on the Equal Employment Opportunity Act of 1972, 2 *U.S. Congressional and Administrative News 1972*, at 2156.

College admission tests and grade prediction scores are at best abstracts of personal ability. Qualities, such as judgment, understanding the problems of others, or the ability to deal with people, are difficult to measure by pencil-and-paper testing. This fact was cited, among others, by federal district courts in enjoining school boards from mechanically applying scores from professionally developed tests in selecting teachers and education executives where disparate racial results would ensue, *Chance v. Board of Education et al.*, 330 F. Supp. 203 at 217 (S.D. N.Y. 1971) *aff'd* 458 F.2d 1167 (2nd Cir. 1972); *Baker v. Columbus School District*, 329 F. Supp. 706 (N.D. Miss. 1971) *aff'd* 462 F.2d 1112 (5th Cir. 1972), *cf. Porcelli v. Titus*, 302 F. Supp. 726 (1969) *aff'd* 431 F.2d 1254 (3rd Cir. 1970) *cert. den.* 402 U.S. 944 (1971). Cf. *U.S. v. Nansemond City School Board*, 5 FEP Cases 657 (E.D. Va. 1972) (exclusive reliance on test scores in layoffs enjoined). If

similar reasoning be applicable to legal training an explanation akin to "business necessity" has a diminished utility for excusing a disproportionate racial exclusion. Corrective consideration for minority applicants to neutralize an anticipated disparity adhering in the examination process restores an over-all equality of opportunity for everyone in the entire admission process, and complies with the spirit of the Civil Rights Act of 1964.

III. Affirmative Action Programs Individualize Test Scores

Experience teaches that testing is more an art than a science; that test scores, while a useful tool, are all-too-often rough measures of skills or ability; and that ranking candidates by test scores alone presumes a precision in measurement that is often elusive and usually delusive when applicants come from disparate backgrounds. Washington courts have long recognized the infirmities in paper-and-pencil testing, e.g., *State ex rel. Raines v. Seattle,* 134 Wash. 360, 375, 235 P. 968 (1925).

In the *DeFunis* case, the Supreme Court of Washington recognized that ranking applicants for law school by predicted first year scores would be fundamentally unfair to minority applicants:

> "Policies for admission of minorities throughout the university recognized that the conventional 'mechanical' credentializing system does not always produce good indicators of the full potential of such culturally separated or deprived individuals, and that to rely solely on such formal credentials could well result in unfairly denying to qualified minority persons the chance to pursue the educational opportunities available at the university." (82 Wn.2d at 20; 507 P.2d at 1175).

The U.S. Supreme Court took note of the same unfairness in an employment context in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 806 (1973);

> ". . . It [*Griggs v. Duke Power Co.*, 401 U.S. 424 (1971)] dealt with standardized testing devices which, however neutral on their face, operated to exclude many blacks who were capable of performing effectively in the desired positions. *Griggs* was rightly concerned that childhood deficiencies in the education and background of minority citizens, resulting from forces beyond their control, not be allowed to work a cumulative and invidious burden on such citizens for the remainder of their lives."

Seen in this light, the University's Affirmative Action plan furthered individual justice.

Disadvantaged minorities in the United States have and do live under the disabilities and consequences of racial discrimination, past and present. A member of a minority passing and reaching an approximate score with competitors has very probably overcome social and economic handicaps that the others did not face. "Colorblind" testing procedures disguise a minority individual's relative accomplishments and cloak the very real promise shown by his achievement. An appointing authority that considers and treats each applicant as an individual, understanding and allowing for the degradation of racial discrimination with minorities, promotes equal opportunity, rather than denies it.

CONCLUSION

The Fourteenth Amendment expanded and enshrined in the United States Constitution the truth the Declaration of Independence deemed self-evident: "All men are created equal. . . ." The Congress, the President, and the Supreme

Court of the United States have each determined that the principle "equal *protection* of the laws" authorizes more profund governmental action in racial matters than neutral *application* of codes and common law; it sanctions affirmative action to effect equality of opportunity, in both form and fact, for persons disadvantaged by racial discrimination.

The City of Seattle therefore respectfully requests that the judgment of the Supreme Court of the State of Washington be affirmed.

Respectfully submitted,

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